UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

WALTER KOON

VERSUS

BURL CAIN

CIVIL ACTION

NO.: 01-327

RULING ON MOTION FOR NEW TRIAL

The matter before the court is a motion for new trial (doc. 112) pursuant to FED. R. CIV. P. 59 filed by the respondent, Burl Cain. The respondent is represented by the State of Louisiana. The petitioner, Walter Koon ("Koon"), opposes the motion (doc. 117). The State has filed a reply (doc. 118). Oral argument is not needed.

I. Background

On February 1, 2007, this court sustained Koon's petition for a writ of habeas corpus (doc. 111). The court granted the writ and ordered that Koon's murder convictions and respective sentences of death be vacated. The court ordered the cause remanded to the Louisiana state court for a new trial. Specifically, the court ruled that Koon's trial counsel, Kevin Monahan ("Monahan"), provided "ineffective assistance of counsel," as that term is contemplated by the Sixth Amendment of the United States Constitution.

In its ruling, the court, in relying on *Soffar v. Dretke*, 368 F.3d 441 (5th Cir. 2004) and the ABA Standards of Criminal Justice in place at the time of Koon's trial, ruled that Monahan's failure to attempt to interview the sole eyewitness to the

killings (Sarah Robinson) constituted constitutionally deficient performance. The court, however, did not only rely on Monahan's failure to interview Robinson in finding that his performance was constitutionally deficient. The court also relied on the facts that Monahan: (1) presented a mental-health/status defense at trial, yet only hired his chief expert witness on the issue one day before trial; (2) failed to use the assistance of co-counsel; and (3) failed to adequately prepare Koon for testimony at trial. In addition, the court found Monahan's performance to be constitutionally deficient with respect to representation of Koon during the penalty phase of the trial. The court found that Monahan essentially failed to put on a case in mitigation of death during the penalty phase.

On February 5, 2007, the State filed a motion for new trial. The State attached as an exhibit a copy of an affidavit by Monahan. The affidavit is apparently a transcript of an interview Monahan gave to counsel for the State. In the interview, Monahan gave a new explanation as to why he did not interview Robinson during his preparation of Koon's murder trial. Monahan's explanation was that Koon admitted that the killings were premeditated between Robinson and himself, and that it would have hurt his defense to interview Robinson. Monahan's affidavit puts forth that after speaking with Koon, he learned that Koon and Robinson planned to kill Koon's estranged wife, Michelle Guidry, and then kill Guidry's boyfriend. Monahan also states in his affidavit that he did not interview Robinson because of ethical concerns. He stated, "She'd need her own lawyers. I was going to create

more problems for her by meeting with her and problems for myself and problems for my case and I felt it just better off I leave her alone."

At the federal hearing, Monahan never asserted these reasons when asked why he failed to interview Robinson. The following exchange took place at the federal hearing:

> [Counsel for Koon]: Before the trial began, did you ever speak to Sarah Robinson?
> [Monahan]: No, I did not interview Sarah Robinson.
> [Counsel for Koon]: Why didn't you interview Ms. Robinson?
> [Monahan]: I've never interviewed a state's witness. I have never really gone and sought out a state's key witness and interviewed them.
> [Counsel for Koon]: Why not?
> [Monahan]: I just felt that she wasn't going to give me anything that would help. I knew that she would probably say through what she told the newspaper and from some other report, that she didn't know he was going to do that. Because if she got up on the stand and said that she knew he was going to do that, then she was a principal. And I knew that she would give me that this was just a spur-of-the-moment thing; that he snapped. And I didn't interview her.
> What I did do is I didn't have her sequestered at the opening statement, and she sat in the courtroom during the opening statement and she heard my opening statement. And I felt that if she heard those facts that I was saying, that she would help [Koon] and say that she did tell him that [Guirdry] was having an affair and that she was supplying the drugs.[1]

Monahan now admits that his testimony to this court at the federal hearing was "cagey." According to Monahan, he did not testify to the "new" reasons for failing to interview Robinson because he wanted to help Koon by holding back on the fact that Koon told him that the killings were premeditated. Although Monahan prefers the word "cagey," the court view his testimony and his actions to be more

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[1]Tr. Feb. 16, 2006, at pp. 110-11.

akin to perjury and fraud on the court. Recognizing that Monahan's affidavit attempts to give a new explanation as to why he did not interview Robinson, the State argues that Monahan's affidavit constitutes newly discovered evidence and warrants a rehearing on Koon's petition. The court is concerned with the State's position. It is noted that the State was aware on at least two prior occasions, Monahan testified under oath in contradiction to the statements he now gives in his sworn affidavit.

II. Analysis

FED. R. CIV. P. 59(a) states that a new trial may be granted "in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States." The State pursues a theory that a new trial is warranted on the basis of newly discovered evidence. A motion for new trial on the basis of newly discovered evidence requires the movant to prove the following: (1) the evidence is newly discovered and was unknown to the movant at the time of the trial; (2) the movant's failure to detect the evidence was not due to a lack of diligence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence would probably produce a different outcome at a new trial. *See* States v. Pena, 949 F.2d 751, 758 (5th Cir. 1991).

Failure to prove any one of the four elements results in a denial of the motion for new trial. *United States v. Freeman*, 77 F.3d 812, 817 (5th Cir. 1996). "Motions for a new trial based on newly discovered evidence are 'disfavored by the courts

and therefore are viewed with great caution.'" *Id.* (*quoting* *United States v. Fowler*, 735 F.2d 823, 830 (5th Cir. 1984)).

As to the fourth element, the court considers whether the "new evidence" would probably have changed the outcome of the trial. *Diaz v. Methodist Hosp.*, 46 F.3d 492, 495 (5th Cir. 1995).[2] The court does not agree with the State that Monahan's new reason for not interviewing Robinson would have changed the outcome of the court's prior ruling. The ABA Standards of Criminal Justice at the time of Koon's trial provided,

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. ... The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt ....

ABA Standards of Criminal Justice, 4-4.1. As the Fifth Circuit has stated, "an actual failure to investigate cannot be excused by a hypothetical decision not to use the

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[2]The court assumes, without finding, that Monahan's affidavit is newly discovered evidence. The court has serious reservations, however, that the affidavit is truly "newly discovered." The Fifth Circuit requires the moving party to show that the failure to detect evidence was not due to a lack of due diligence in order to consider evidence as "newly discovered." *United States v. Villarreal*, 324 F.3d 319, 325 (5th Cir. 2003). "If the defense failed to appreciate the significance of the evidence, that failure constituted a lack of diligence." *Id.* (*citing* *United States v. Jaramillo*, 42 F.3d 920, 925 (5th Cir. 1995).

There is an issue as to whether the State failed to appreciate the significance of Monahan's failure to interview Robinson, and to further explore what Monahan meant by his now admitted "cagey" answer that he "just felt that [Robinson] wasn't going to give [him] anything that would help." Tr. Feb. 16, 2006, at pg. 110. In this case, the State was aware that Robinson's testimony during the guilt phase of the trial would be explored during the federal evidentiary hearing. (Doc. 24). The State was well aware that Robinson was the only eyewitness to the crimes at issue. It can hardly be argued that the State did not know that Monahan's investigation of Robinson was of vital importance to Koon's claim of ineffective assistance of counsel.

unknown results." *Soffar*, 368 F.3d at 473-74.

Monahan's new reason for not investigating Robinson's story is based *solely* on what Koon allegedly told him. Simply relying on Koon's statements as a basis for refusing to attempt to interview the sole eyewitness to the crime is not sound trial strategy, but rather is constitutionally deficient performance. ABA Standards of Criminal Justice, 4-4.1. The court finds Koon's expert witness, Phyllis Mann, to be credible, and it is persuaded by her affidavit. Ms. Mann states,

> Any attorney defending Mr. Koon in connection with these homicides would have to prepare to confront or present the testimony of Ms. Robinson at Mr. Koon's trial. In order to prepare to either confront or present that testimony, it would be necessary to at a minimum attempt to interview Ms. Robinson to learn what she knew about the events preceding, during, and following the homicides.
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> Assuming Mr. Monahan's affidavit to be true, ... it is necessary for the defense attorney to learn whether the sole eyewitness corroborates the information provided by the client. ... Further, it was incumbent upon the trial attorney to learn whether Ms. Robinson corroborated or refuted the information allegedly provided by Mr. Koon because this could have shed light on Mr. Koon's mental status and informed the defense to be presented at both the guilt and penalty phases of his first degree murder trial. If Ms. Robinson confirmed that the information provided by Mr. Koon was correct, then the trial attorney would have wanted to determine the circumstances under which any such plan was formed.[3]

It was Monahan's failure to *attempt* to interview Robinson that this court relied on in determining that Monahan's performance was deficient. Doc. 111, pg. 21. Had Monahan taken the time to fully investigate the case, he would have learned that Robinson was willing to cooperate with his theory of defense. At the federal hearing, Robinson testified that Koon snapped after she told him that Guidry

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[3]Koon's Exhibit, Affidavit of Phyllis Mann, at pg. 2.

was having an affair. The court has already determined Robinson to be a credible witness. While it is true that Robinson has changed her story in the past, the court carefully observed her demeanor and listened to her testimony. The court believes her testimony at the federal hearing was true.

Monahan's affidavit, on the other hand, comes just four days after the court found his representation constitutionally deficient. His affidavit is highly suspect, and the court in fact finds that his affidavit is not credible. *See* Freeman, 72 F.3d at 818 (denying a motion for new trial based on newly discovered evidence on the basis of "questionable credibility" of the allegedly new evidence).

Monahan now states that Koon told him that he and Robinson planned the killings, but Monahan's prior testimony has been quite different. At the state habeas hearing, Monahan testified that he "adopted [his theory of defense] based upon what [Koon] told him."[4] His theory of defense was that Koon acted in a heat of passion with no specific intent to kill. Monahan testified that Koon "in no way, shape or form had the intent of that when he went over there–to kill her."[5] He testified that when he first met Koon, Koon admitted to the killings, but "he denied [the killings] were intentional ...."[6] The court further notes that Monahan previously testified that at Koon's trial, he hoped that Robinson would hear his opening

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[4]S.R. Vol. 1, Tab 28, pg. 20.

[5]*Id.* at pg. 21.

[6]*Id.* at pg. 43.

statement and then "get up there and tell the truth." According to Monahan, if Robinson "would have told the truth," that "would have corroborated the manslaughter and the meltdown, and that would have helped the case."

The most compelling reason for finding Monahan's affidavit to not be credible, however, comes from the following testimony he gave to the state habeas court,

> I think there is information about with Sarah Robinson as to, you hear on the back of the tape she's saying [Koon]'s gone to Dealer Wrecker and I think [Guidry's] boyfriend worked at Dealer Wrecker and I think it has come out later that they actually had a plan to go over there and do the killing and then go to Dealer's Wrecker and kill the boyfriend, and then go out of town. *So, you know, I didn't have that information at the time. This is what I learned later.*[7]

This shows that Monahan did not know, at least before Koon's trial, that there was any alleged conspiracy between Koon and Robinson to murder Guidry. Therefore the court finds that Monahan had no knowledge, while representing Koon, that Koon conspired with Robinson to commit the crimes.

The law pursuant to *Soffar* and the ABA standards required Monahan to interview Robinson and investigate her version of the events. Monahan's obligations did not change even if he was aware of an alleged conspiracy between Robinson and Koon. His failure to take the elementary step of interviewing the sole eyewitness constituted ineffective assistance of counsel. *Soffar*, 368 F.3d at 473-74; ABA Standards of Criminal Justice, 4-4.1.

Finally, the court notes that it was not solely Monahan's failure to investigate

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[7] *Id.* at pg. 48 (emphasis added).

Robinson's story that constituted ineffective assistance of counsel. In addition, Monahan hired his chief expert witness on the issues of mental health and mental status only one day before trial. Monahan's theory of defense focused on Koon's mental state at the time of the killings–that Koon was in a drug withdrawal process and that he "snapped" when learning of Guidry's affair. The court need not restate to what effect the late hiring had on Koon's defense. It suffices to say that Monahan's affidavit presents nothing new to question the court's ruling on these issues.

Nonetheless, the State argues that if Monahan allowed Koon to be interviewed by a mental health expert at a time that was well in advance of the trial, the possibility existed that Koon would reveal to the expert that the killings were premeditated. The result, the State argues, could have been that the admission would be included in an expert report that would be discoverable by the State.

The State's reasoning is based on pure speculation. Defense counsel could conceivably be worried in every case requiring mental examination of the defendant that the defendant may blurt out a confession to the examining doctor. This speculative worry is not a sufficient reason for failing to adequately investigate a mental health defense. As Dr. Seiden testified at the federal hearing, it was all but impossible for Monahan to effectively present a mental health defense without timely employing his expert. The State's argument is therefore rejected.

III. Conclusion

The court has previously ruled that Monahan provided ineffective assistance of counsel. The State has failed to persuade the court to revisit the issue.

It is hereby ordered that the State's motion for new trial (doc. 112) is DENIED.

Baton Rouge, Louisiana, April 11th, 2007.

JAMES J. BRADY, DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA